

TORT OBLIGATIONS AND THE CONFLICT OF LAWS.†

CREATION OF LIABILITY.

"It is not questioned but that, if liable under the *lex loci delicti*, the defendant ought to be held liable here. The right to sue for the tort, the liability of the perpetrator, and the defenses that he may plead are, with few exceptions, governed by the law of the place."¹ This statement enunciates the rule prevailing in this country upon the subject and is sound upon principle and authority.

The theoretical explanation of the doctrine may be stated briefly. Suppose a hypothetical plaintiff, P, is in Massachusetts. While there he is protected by and owes obedience to Massachusetts law. That law recognizes certain interests of P as entitled to protection, as, for instance, P's unimpaired bodily condition. If D, the defendant, injures P by committing a battery upon him, the Massachusetts law gives P a claim for money damages against D, a right to be made whole, so far as payment of money can accomplish it, for the harm done P. Massachusetts law is the only law which can properly determine the legal consequences of D's act for it was the only law in control where the transaction complained of took place.^{1a} That law must determine whether the harm done to P was to an interest entitled to protection, whether the conduct of D was of the sort that renders him accountable to P for its injurious consequences to

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¹Ladd, J., in *Dorr Cattle Co. v. Des Moines National Bank*, 127 Ia. 153, 98 N. W. 918, 102 N. W. 836, "It is the law of this state, and generally, that the law of the place where the injury was received determines whether a right of action exists." *Pendar v. H. & B., etc., Co.*, 35 R. I. 321, 87 Atl. 1 (1913).

^{1a}"The theory . . . is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which like other obligations, follows the person, and may be enforced wherever the person may be found. . . . But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation . . . but equally determines its extent." Holmes, J., in *Slater v. Mex. National R. Co.*, 194 U. S. 120, 24 Sup. Ct. 581; Acc., Cardozo, J., in *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198, and Hughes, J., in *Spokane, etc., R. Co. v. Whitley*, 237 U. S. 487, 35 Sup. Ct. 655. This theory is criticized and a different analysis made in a brilliant paper by Professor W. W. Cook, "The Logical and Legal Bases of the Conflict of Laws," 33 YALE L. JOUR. 457.

P,² whether the connection between D's conduct and P's injury was close enough to hold D responsible, and whether P's own conduct was of such nature as to preclude him from recovery.³ If P brings his action against D in New York for this Massachusetts battery he is not asking New York to give an extra-territorial effect to the Massachusetts law. He asks that New York recognize and enforce his claim against D, acquired in Massachusetts and given by Massachusetts law. If Massachusetts law gave him, under the circumstances, no claim against D, he has nothing to enforce when he sues D in New York, and should not be allowed to recover.

A different rule prevails in England. It was held in *Machado v. Fontes*⁴ that an action could be maintained in England for a libel published in Brazil by the defendant concerning the plaintiff, even though by the law of Brazil, the act complained of was not a ground of action against the defendant in which the plaintiff could recover damages. It was enough, the court thought, that the defendant's acts were not "justifiable" by the law of Brazil. The decision has been criticized by American writers.⁵ The plaintiff, in such a case, has no claim to be enforced by action in the second state. The defendant's liability to criminal punishment by the public authorities at the place

² Where seizure of the plaintiff's goods in Muscat by defendant was permitted by the law there in force at the time, no recovery was allowed in an action for conversion brought in England. *Carr v. Francis Times & Co.*, [1902] A. C. 176.

³ So where a plaintiff was precluded from recovery by the law of Maine, where his injury took place, because his injuries occurred while he was unlawfully traveling on Sunday, he was denied relief when he sued in New Hampshire. *Beecham v. Portsmouth Bridge*, 68 N. H. 382. And if a plaintiff's claim is barred by his contributory negligence by the *lex loci delicti*, he cannot recover in another state where the law may be different. *L. & N. R. Co. v. Whitlow's Admr.*, 19 Ky. L. Rep. 1931, 43 S. W. 711, criticizing *Johnson v. C. & N. W. Ry. Co.*, 91 Iowa 248, 59 N. W. 66; *Bridger v. Asherville & S. R. R.*, 27 S. C. 456, 3 S. E. 860; *Railway v. Lewis*, 89 Tenn. 235, 14 S. W. 603. Conversely, if contributory negligence does not bar the plaintiff under the *lex loci delicti*, he may recover even when he sues in a state where the common law rule on the subject prevails. *Morrisette v. C. P. R. Co.*, 76 Vt. 267, 56 Atl. 1102. *Accord*, assumption of risk, *S. C. & G. R. Co. v. Thurman*, 100 Ga. 804, 32 S. E. 863.

⁴ [1897] 2 Q. B. 231.

⁵ Thus Minor (p. 479 note) says: "The decision is in direct contradiction of all the principles of private international law relating to torts, and if followed to its logical conclusions would overturn all the rules established for the governance of such cases." See also 2 Wharton 1096; 11 Harv. L. Rev. 261, and in England, Dicey, 3d ed., 38, also criticizes the logic of the position.

where his act was done is a matter with which they, and not this plaintiff, are concerned. No case in this country has been found where recovery in tort has been allowed for what was not the basis of an action by the *lex loci delicti*.⁶

SITUS OF THE TORT.

Some difficulty may be encountered in determining the *locus delicti*. Suppose the defendant carelessly does an act in state A which results in harm to the plaintiff in state B. The law of B controls. The plaintiff does not sue the defendant for the latter's negligence, but because the negligence has caused the plaintiff harm. The tort is complete only when the harm takes place, and it is the law of the state where this happens that determines the existence of the plaintiff's claim.⁷ A similar question arises when an action is brought to recover damages for a death by wrongful act. The defendant, by a negligent act done in state A, starts a force which injures the victim in state B from which he subsequently dies in state C. Under the statute of which state is an action for damages for the death to be brought? The weight of authority is that the law of B where the injury takes place, must give the right of action if recovery is to be had, though the death of the injured party is a condition precedent to its accrual.⁸

⁶ In some cases the phrase "actionable or punishable by the law of the place in which it is done" appears, though no significance is attached to the term "punishable." *Le Forest v. Tolman*, 117 Mass. 109; *Carter v. Goad*, 50 Ark. 155, 6 S. W. 719. Others omit that term in the requirement. *The Lamington*, 87 Fed. 752; *Ala., etc., R. Co. v. Carroll*, 97 Ala. 126, 11 So. 803, 18 L. R. A. 433, 38 Am. St. Rep. 163; *McLeod v. C. & P. R. R. Co.*, 58 Vt. 727, 6 Atl. 648. See *Am. Banana Co. v. United Fruit Co.*, 213 U. S. 347, 29 Sup. Ct. 511. A death caused by defendant's wrongful act is not "justifiable." Yet no action may be brought to recover damages therefor unless allowed by the law where the injury was inflicted. *Whitford v. Panama R. Co.*, 23 N. Y. 465. See further 56 L. R. A. 194, note.

⁷ *Ala., etc., R. Co. v. Carroll*, *supra*, note 6; *Cameron v. Vandergriff*, 53 Ark. 381, 13 S. W. 1092; *Conn. Valley L. Co. v. M. C. R. Co.*, 78 N. H. 553, 103 Atl. 263. See *Leonard v. Decker*, 22 Fed. 741. Cf. *Smith v. So. Ry. Co.*, 136 Ky. 162, 123 S. W. 678. On jurisdiction for criminal punishment, see *People v. Zayas*, 217 N. Y. 78, 111 N. E. 465, and note in 28 L. R. A. 59.

⁸ *Van Doren v. Pa. R. Co.*, 35 C. C. A. 282, 93 Fed. 260; *De Harn v. Mex. N. Ry. Co.*, 86 Tex. 68, 23 S. W. 381; *Rudiger v. Chicago, etc., Ry. Co.*, 94 Wis. 191, 68 N. W. 661; *Contra, Hoodmacher v. L. V. R. Co.*, 218 Pa. 21, 66 Atl. 975. But compare *Centofanti v. Pa. R. Co.*, 244 Pa. 255, 90 Atl. 558. See 56 L. R. A. 218, note, and 9 L. R. A. (N. S.) 1078.

LIMITATIONS UPON PLAINTIFF'S RIGHT.

How far will the rules of the law of the place be looked to in determining the plaintiff's recovery for an alleged tort? Matters of procedure are unquestionably governed by the *lex fori*.⁹ While the time in which an action may be brought is generally regarded as a matter of procedure and therefore governed by the law of the former, a limitation upon the time for bringing suit, where a statute creates a right of action is frequently declared to be a limitation upon the right itself and controlled by the *lex loci delicti*.¹⁰ Even after a right has arisen the law-making power of the state of its creation may effectually limit the time in which an action to enforce it may be brought, and this limitation will be effective when suit is brought in another state.¹¹ A leading English case goes further and holds in effect that the plaintiff's right can be taken away altogether by the law-making power of the place of injury, and no action can afterwards be maintained elsewhere to enforce the claim.¹²

A somewhat similar problem is involved when the law-making body of the state where a cause of action for a tort arises endeavors to encourage home industry by a limitation upon the place where suit may be brought, as by providing that the action shall be maintained in the courts of that jurisdiction and not elsewhere. If this can be interpreted as but a prohibition against suit outside the state, it will not preclude recovery elsewhere.¹³ A statute of New Mexico in terms made recovery for

⁹ This general proposition is undisputed. Solution of the difficult questions of what are matters of substance and what are matters of procedure is not undertaken in this discussion.

¹⁰ *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140.

¹¹ *Davis v. Mills*, 194 U. S. 451, 24 Sup. Ct. 692. In this case the time allowed in which suit could be brought was sufficient so that there was no violation of due process of law.

¹² *Phillips v. Eyre*, L. R. 6 Q. B. 1. X assaulted and imprisoned A in Jamaica. At the time, the act was assumed to be wrongful by the law of Jamaica. The Legislature there afterwards passed an act by which the assault was "made . . . lawful." Recovery in England was denied. See Dicey, 3d ed., pp. 704 and 768. Might not such legislation in this country be objected to as a violation of the due process clause of the Constitution? While it has been said that "there can be no vested right in a claim for damages for a tort," *Carson v. Gore-Meenan Co.*, 229 Fed. 765, such a statement seems too broad. See 33 HARV. L. REV. 727.

¹³ *Tenn., etc., Co. v. George*, 233 U. S. 354, 34 Sup. Ct. 587. See a note discussing the problem, 23 COL. L. REV. 167.

personal injuries inflicted within the territory conditional upon the bringing of an action in New Mexico within one year from the time such injuries occurred. The plaintiff, who had been injured by the defendant in New Mexico, brought suit in Texas and recovered, without having brought suit in New Mexico. The United States Supreme Court held that allowing recovery in Texas did not violate the full faith and credit clause of the Constitution.¹⁴ Ill considered as the legislative policy appears, it is difficult to see why this condition upon the right did not condition it everywhere, as was said in the dissenting opinion. In another case where the plaintiff was a citizen of New Mexico, the Texas court refused to allow him to recover when the injuries had been sustained in New Mexico and he had not complied with its statute.¹⁵

"LOCAL" AND "TRANSITORY" ACTIONS.

In the early ages of common law judicial history, juries were selected for their personal acquaintance with the parties and knowledge of the facts of the cause. With such a system prevailing it was obviously impossible that redress could be given for a foreign tort, or any other foreign cause of action. It was strictly necessary that the neighborhood where the jury was summoned should be that where the cause of action had arisen. This difficulty disappeared, however, when evidence could be presented to the jury by the testimony of witnesses.¹⁶ There was another difficulty in the way in England. As Professor Beale states it: "In its origin the jurisdiction of the king's courts in personal actions . . . was based upon the commission of the breach of the king's peace; and as this was a jurisdictional fact, the tort, including the breach of the peace, must be laid as

¹⁴ *A. T. & S. F. Ry. Co. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. 397, criticized in 22 HARV. L. REV. 535. "Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right." *Galveston, etc., Ry. Co. v. Wallace*, 223 U. S. 481, 490, 32 Sup. Ct. 205.

¹⁵ *S. P. Co. v. Dusablon*, 48 Tex. Civ. App. 203, 106 S. W. 766. See also *Coyne v. S. P. Co.*, 155 Fed. 683.

¹⁶ For discussion of this topic see elaborate note to *Mostyn v. Fabrigas*, 1 Smith's Leading Cases, or Thayer, Preliminary Treatise on Evidence, 90 *et seq.*

occurring at some place within the kingdom. When the new action on the case came into existence the same form of allegation naturally continued."¹⁷ As in other instances in the development of our law the obstacle was circumvented by a fiction. A fictitious venue was laid at some place within the kingdom, and this fictitious allegation was not allowed to be disputed. So it became possible in England to sue for a foreign tort.¹⁸ The same result had been reached earlier in this country without employing the fiction.¹⁹ It may be said generally, then, that a personal action may be brought in any place where the requisite service upon the defendant may be had.²⁰ Legislatures may and sometimes do forbid suits within the state upon certain foreign causes of action.²¹ Such a provision does not affect general principles but only governs the courts of the particular state.

One class of personal actions has been held to be local, not transitory, so that recovery is not allowed outside the state where the offense occurred. The chief instance is the action for trespass to foreign realty. The numerical weight of authority refuses to allow a recovery in such a case,²² though there is vigorous dissent²³ and frequent reluctance on the part of courts to apply the rule. The more reasonable view seems opposed to

¹⁷ "The Jurisdiction of Courts over Foreigners," 26 HARV. L. REV. 290.

¹⁸ *Mostyn v. Fabrigas*, 1 Cowp. 161, 1 Smith's Leading Cas., 12th ed., 662.

¹⁹ Anonymous, 2 Mass. Col. Rec. 255.

²⁰ This proposition is necessarily implied in all the cases cited in this discussion where recovery was allowed for a foreign tort. See also *Mitchell v. Harmony*, 13 How. (U. S.) 115, 137; *Roberts v. Dunsmuir*, 75 Cal. 203, 16 Pac. 782; *Simpson Fruit Co. v. Atchison, etc., Ry. Co.*, 245 Ill. 596, 92 N. E. 524; *Ackerson v. Erie Ry. Co.*, 31 N. J. L. 309; *McLeod v. C. & P. Ry. Co.*, *supra*, note 6. For limitations in New York, see *Gardner v. Thomas*, 14 Johns. 134; *Burdick v. Freeman*, 120 N. Y. 420, 24 N. E. 949; *Smith v. Crocker*, 14 App. Div. 245, 43 N. Y. Supp. 427.

²¹ *Chambers v. B. & O. R. Co.*, 207 U. S. 142, 28 Sup. Ct. 34; *Wall v. C. & O. Ry. Co.*, 290 Ill. 227, 125 N. E. 20.

²² *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771; *Kroll v. Ry. Co.*, 98 Neb. 322, 152 N. W. 548; *Montesano Co. v. Portland Iron Works*, 78 Ore. 53, 152 Pac. 244; *British South Africa Co. v. Companhia de Mocambique*, [1893] A. C. 602.

²³ *Peyton v. Desmond*, 129 Fed. 1; *Little v. Chicago, etc., Ry.*, 65 Minn. 48, 67 N. W. 846. The New York statutes now permit the action though the statute has been held not to be retroactive in its application. *Jacobus v. Colgate*, 217 N. Y. 235, 111 N. E. 837, commented upon in 29 HARV. L. REV. 875.

the self-imposed limitation of jurisdiction upheld by the majority, which seems an archaic survival of outworn rules of venue. The action is one for damages; the determination of the foreign title for the purposes of this suit is "merely the incidental determination of a fact such as the courts are every day compelled to make."²⁴ The majority rule permits a defendant to escape all liability for the harm he does if he prevents suit in the state where the land lies by keeping beyond service of process in that jurisdiction.

Such an arbitrary doctrine should not be extended and cases seem properly decided which allow the plaintiff to recover for conversion of crops, lumber, or minerals severed from the land in another jurisdiction, even though an entry on the land was involved in the commission of the alleged offense.²⁵

CONDITIONS UPON ENFORCEMENT OF FOREIGN LIABILITY.

Assuming the plaintiff has acquired under the law of a foreign state, a claim in tort against the defendant, and that the claim is "transitory" and not "local," are there further obstacles to its enforcement in any common law forum he may choose?²⁶ There are still three possible difficulties.^{26a} The claim against the alleged wrong-doer may be regarded as penal in its nature, and so not enforceable outside the state where it arose, for it is well settled that one state will not enforce penalties imposed by another. The question of what constitutes a penal law need not be re-examined here; it is not improbable that this restriction will have less significance after the United States Supreme

²⁴ See Beale, 26 HARV. L. REV. 291, 292; Judicial comments and a collection of authorities may be found in 26 L. R. A. (N. S.) 928. Well-written criticism may be found in Kuhn, "Local and Transitory Actions in Private International Law," 66 U. OF PA. L. REV. 301.

²⁵ *Hodges v. Hunter Co.*, 61 Fla. 280, 54 So. 811; *Arizona Mining Co. v. Iron Cap Copper Co.*, 119 Me. 213, 110 Atl. 429; *Jacobus v. Colgate*, *supra*, note 23. But see *Arizona Min. Co. v. Iron Cap Copper Co.*, 236 Mass. 185, 128 N. E. 4. For further cases, see notes, 26 L. R. A. (N. S.) 940, 34 *idem*. 994.

²⁶ Rules of civil law countries on this subject differ widely from ours and are not intended to be included in statements made herein. See "The Jurisdiction of Courts over Foreigners," by J. H. Beale, 26 HARV. L. REV. 193.

^{26a} *Acc.*, *Lauria v. duPont de Nemours Co.*, 241 Fed. 687, 690.

Court's elaboration of what constitutes a penal law.²⁷ A second difficulty is that the legal machinery of the forum may be unsuited to the enforcement of a right of the kind given by the *lex loci delicti*. This is not a common but is an entirely possible situation. *Slater v. Mex. Nat. R. Co.*²⁸ is an instance. The plaintiffs sought to recover in Texas compensation for injuries sustained in Mexico which had resulted in the death of Slater. By the Mexican law the damages recoverable were to be paid in periodical payments, the amounts of which were subject to modification by the court from time to time, in case of change of circumstances of the beneficiaries. The common law court had no machinery for giving an award of this sort, and it was thought that justice would not be done in giving the kind of relief which could be offered as a substitute. Mr. Justice Holmes said: "But to reduce a liability conditioned as this was to a lump sum would be to leave the whole matter to a mere guess."

The third possible obstacle to the plaintiff's suit is that the enforcement of the foreign cause of action may be contrary to that vague thing called "the public policy of the forum." This difficulty is not peculiar to the enforcement of claims for foreign torts, but appears in settling questions of recognition of nearly all foreign acquired rights. By the very nature of the question involved, it is impossible to state definitely in advance what tort claims acquired under foreign law are to be refused enforcement because of conflict with the public policy of the forum. But one or two points concerning the problem may be made.

Does policy demand that the forum refuse to enforce any claim for redress for a foreign tort if the facts on which the claim is based would not have created a similar claim in the jurisdiction where recovery is now sought? The affirmative is the rule in England. In the leading case of *The Halley*²⁹ an ac-

²⁷ For a strong decision showing the present tendency, see *Loucks v. Standard Oil Co.*, *supra*, note 1a, and *Sullivan v. Hustis*, 237 Mass. 441, 446-448, 130 N. E. 247. The latest Supreme Court case is *Atchison, etc., Ry. Co. v. Nichols*, 264 U. S. 348, 44 Sup. Ct. 353 (1924), in which *Huntington v. Atrill* is cited and followed.

²⁸ 194 U. S. 120, 24 Sup. Ct. 581; *Acc.*, *Mexican Nat. Ry. Co. v. Jackson*, 89 Tex. 107, 33 S. W. 857. Suppose a suit in equity had been brought, alleging an inadequacy of the remedy at law?

²⁹ [L. R.] 2 P. C. 193.

tion was brought in England for damages sustained in a collision between the vessel of the plaintiffs and that of the defendants. The accident took place in the river Scheldt, and was due to the negligence of the pilot whom the owner of the vessel was compelled to employ. By the Belgian or Dutch law the owner was liable for results of the negligence of the pilot under such circumstances; by the law of England he was not. It was held that no action could be maintained in England.³⁰

The theoretical explanation for such a rule is the objection to giving damages or in effect punishing something which English law does not condemn.³¹ But imposition of tort liability does not necessarily involve punishment for immoral conduct. This is well shown, even in English law, in the responsibility of the owner for harm done by escaping water or animals, regardless of the care he has taken to prevent it. Civil responsibility for harm done and punishment for conduct regarded as criminal are separate matters today even though in early law no distinct line was drawn between the two. May not the real source of the difficulty be the notion that in giving redress for the foreign wrong the forum is allowing the foreign law an extra-territorial operation? If such were the case, it is not surprising that a court should be reluctant to set aside its own rules and allow the foreign law to operate when its own law expressed a different policy. The correct position is that the foreign law has no extra-territorial effect; but that when the alleged tort occurred an obligation was imposed upon the defendant, and this obligation follows the person.³² The law of the forum is asked to enforce the obligation created by the foreign law.

Statements may be found by American authority to the effect that to sue for a foreign tort (and foreign includes another

³⁰ The English rule then is that an act done in a foreign country can be sued for as a tort in England if it is wrongful, "unjustifiable," when done, and if it would have been a wrong if done in England. See Dicey, 3d ed., p. 38, and p. 694 *et seq.*; Baty, *Polarized Law* 50, 51. As already explained the rule seems indefensibly loose on the first part of the test. It seems unduly strict upon the second.

³¹ Dicey, 3d ed., p. 697.

³² See the language of Mr. Justice Holmes, note 1a, *supra*. Reference should also be made to the discussion by Mr. Justice Beach, "Uniform Interstate Enforcement of Vested Rights," 27 *YALE L. JOUR.* 656.

state of the United States) the defendant's conduct must be actionable both by the *lex loci delicti* and *lex fori*.³³ Some of the cases refusing to enforce rights acquired under death-by-wrongful-act statutes in other states lend some support to the view.³⁴ It must be remembered, however, that the earlier statutes on this subject were not infrequently penal in character, and this fact accounts for the result. The better view is that recovery for a foreign tort will not be refused even though the *lex fori* would not have imposed liability had the operative facts occurred there.³⁵ Whether the foreign claim arose under the common law or was given by statute should make no difference.³⁶ Judge Mitchell's statement of the point³⁷ is worth re-

³³ Wharton, Conflict of Laws, sec. 478; see, however, sec. 478a, 3d ed., and sec. 4a of the same. The American cases cited in sec. 478, do not support the author's text. See, however, *The Lamington*, 87 Fed. 752.

³⁴ *Texas & P. Ry. Co. v. Richards*, 68 Tex. 375, 4 S. W. 627.

³⁵ *Walsh v. N. Y. & N. E. R. Co.*, 160 Mass. 571, 36 N. E. 584; *Eingartner v. Ill. Steel Co.*, 94 Wis. 70, 68 N. W. 664.

³⁶ *Dennick v. Cent. R. Co.*, 103 U. S. 11; *S. C. & G. R. Co. v. Thurman*, *supra*, note 3; *C. & E. I. R. Co. v. Rouse*, 178 Ill. 132, 52 N. E. 951; *Nelson v. C. & O. R. Co.*, 88 Va. 971, 14 S. E. 838. See *N. P. R. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, and cases in note 37, *infra*. So where actions are brought in one state to recover for injuries to a miner sustained in mining operations in another, statutory rules of the place of injury governing rights and duties have been applied without hesitation. *Vagaski v. Con. Coal Co.*, 225 Fed. 913; *Majestic Collieries Co. v. Bradley*, 132 Ky. 533, 116 S. W. 738; *Firment v. R. & P. Co.*, 170 App. Div. 307, 155 N. Y. Supp. 879. It would be misleading to create the impression that this position is supported by all the authorities, especially in a cause of action arising under the statute of another state. Courts frequently say, even when allowing a recovery, that the enforcement of the plaintiff's claim is only allowed when there is a statute in force at the forum, substantially similar to that of the *lex loci delicti*. This is especially marked in the cases where recovery is sought for damages for death by wrongful act. A collection of authorities may be found in 56 L. R. A. 195 *et seq.*, and see further discussion in this paper.

³⁷ *Herrick v. M. & St. L. Ry. Co.*, 31 Minn. 11. See also *Powell v. G. N. R. Co.*, 102 Minn. 448, 113 N. W. 1017, and *Dennick v. Cent. R. Co.*, *supra*, note 36. Cf. *Reynolds v. Day*, 79 Wash. 499, 140 Pac. 681. Here the forum had substituted statutory industrial insurance for the common law rules of employer's liability, but an action for an alleged tort occurring in Idaho was allowed to be prosecuted. In a much more recent case than the Herrick decision, Judge Cardozo says (*Loucks v. Standard Oil Co.*, *supra*, note 1a): "Right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home. Similarity of legislation has indeed this importance; its presence shows beyond question that the foreign statute does not offend local policy. But its absence does not prove the contrary. It is not exalted into an indispensable

peating: "But it by no means follows that because the statute of one state differs from the law of another state, therefore it would be held contrary to the policy of the laws of the latter state. . . . To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens."

Further, it is difficult to imagine a case where enforcing a claim for money damages in one state where the claim arose in another could seriously violate notions of morality in the first. This is especially true as between states of the United States. Says Mr. Justice Beach:³⁸ "We must admit that extreme cases might be imagined in which the mere enforcement of a foreign right would be an offense against good morals. But such cases cannot arise among the several states of the United States. Their differences relate to the minor morals of expediency, and to debatable questions of internal policy. It would be an intolerable affectation of superior virtue for the courts of one state to pretend that the mere enforcement of a right validly created by the law of a sister state would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law or would be of such evil example as to corrupt the jury or the public."

Other important questions, like that of the burden of proof, questions of evidence, whose law governs the measure of damages,³⁹ arise, but are more appropriately considered in discussing differences between questions of substance and procedure. It remains to elaborate somewhat more in detail the application of principles already stated to a few particular situations.

condition. The misleading word 'comity' has been responsible for much of the trouble. It has been fertile in suggesting a discretion unregulated by general principles."

³⁸ In the article cited, note 32, above. As Judge Cardozo says (*Loucks v. Standard Oil Co.*, *supra*, note 1a): "The fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained. At least, that is so among the states of the Union."

³⁹ See "Damages for a Foreign Wrong," 3 IOWA LAW BULLETIN 1.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS.

Prior to the passage of Workmen's Compensation Acts, which have now been adopted in most of our states, the rule established by the authorities was that the question whether an employee could sue his employer in tort depended upon the law of the place where the injury occurred, not where the contract of employment was made³⁹ or where suit was brought. If the law of the place of injury gave an action it could be maintained in a state where upon the same facts none would have been created,⁴⁰ and if the *lex loci* gave the plaintiff no claim, he could not recover in another state.⁴¹ This is a sound application to the particular situation of the general rules determining tort liability, and is the common law rule in the absence of statutory change.

One statutory change is the Federal Employers' Liability Act, which governs liability for injuries sustained while the employee is engaged in interstate commerce. What constitutes employment in interstate commerce so as to bring the employee within the act is a difficult question which need not be discussed here.

The Conflict of Laws questions regarding Workmen's Compensation Acts have called forth many recent decisions from the courts. The chief problem may be put thus hypothetically: W, a workman engaged in the building trades enters the service of the M Company, building contractors, in Michigan. In the course of his employment, he is sent to work upon a job for his employer in Ohio, and while so engaged meets with an accident. Under what law should W seek compensation for his injuries?

³⁹ *K. C., etc., R. Co. v. Becker*, 67 Ark. 1, 53 S. W. 406; *Ala., etc., Co. v. Carroll*, *supra*, note 6. An instance of statutory modification of this rule is found in *Ruck v. C. M. & St. P. Ry. Co.*, 153 Wis. 158, 140 N. W. 1074.

⁴⁰ *C. & E. I. R. Co. v. Rouse*, *supra*, note 36; *Walsh v. N. Y. & N. E. R. Co.*, *supra*, note 35; *Njus v. Chicago, etc., Ry. Co.*, 47 Minn. 92, 49 N. W. 527; *Fogarty v. St. L. T. Co.*, 180 Mo. 490, 79 S. W. 664. Refusing recovery, *Anderson v. M. & St. P. Ry. Co.*, 37 Wis. 321.

⁴¹ *Ala., etc., Co. v. Carroll*, *supra*, note 6; *Baltimore, etc., R. Co. v. Jones*, 158 Ind. 87, 62 N. E. 994; *Turner v. St. Clair Tunnel Co.*, 111 Mich. 578, 70 N. W. 146; *Alexander v. Pa. Co.*, 48 Ohio St. 623, 30 N. E. 69. So, too, if the claim has been released by acceptance of benefits under a contract, providing that such benefits operated to release claims against defendant. *Canaday v. Atl., etc., R. Co.*, 143 N. C. 439, 55 S. E. 835.

May he, for instance, claim compensation under the Michigan statute? Could he also claim damages at common law in Ohio, assuming common law rules still prevailed there?

If the compensation acts were but a statutory substitute for the common law rules of liability, or these rules plus their statutory modifications, the rule would be clear: W's claim must be governed by the law of the place where his injury occurred. In the case supposed, W's claim would be settled by the Ohio law without reference to the Michigan statute. There is some authority for this position.⁴² But the view taken by most courts is that there can be recovery under the act in force in the state where the workman entered the employer's service, even though the injury takes place elsewhere.⁴³ It is misleading to state this result by saying that the compensation statute of the first state has an extra-territorial operation.⁴⁴ The Michigan statute cannot, in the case supposed, extend into Ohio and displace the Ohio law. A more plausible explanation is that the contract of employment, as made in a state where the compensation statute is in force, impliedly stipulates, *inter alia*, that in case of accident the employer shall pay and the employee shall accept compensation as provided in the statute, and that this shall be in lieu of any other claim.⁴⁵ Such an argument has added force when both parties make payment into a fund from which payments are made to injured workmen.⁴⁶ This contract

⁴² *Union Bridge, etc., Co. v. Ind. Comm.*, 287 Ill. 396, 122 N. E. 609; *In re Gould*, 215 Mass. 480, 102 N. E. 693; *Tomalin v. Pearson* [1909] 2 K. B. 61.

⁴³ *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372; *Ind. Comm. v. Aetna L. Ins. Co.*, 64 Colo. 480, 174 Pac. 589; *Crane v. Leonard*, 214 Mich. 218, 183 N. W. 204; *Rounsaville v. Cent. R. Co.*, 87 N. J. L. 371, 94 Atl. 392; *Gooding v. Ott*, 77 W. Va. 487, 87 S. E. 862; and see citations in following notes, especially note 52.

⁴⁴ "It is obvious that the . . . act *ex propria vigore* can have no extra territorial effect." *Anderson v. Miller, etc., Co.*, 169 Wis. 106, 115, 170 N. W. 275. "When it is said that a statute, such as the Workmen's Compensation Act, has an extra-territorial effect, it cannot mean that the law does, or attempts to, create rights abroad. . . ." *Lennon, J.*, in *Quong Ham Wah Co. v. Ind. Acc. Comm.*, 184 Cal. 26, 192 Pac. 1021.

⁴⁵ *Kennerson v. Thames Towboat Co.*, *supra*, note 43; *Pierce v. Bekins, etc., Co.*, 185 Iowa 1346, 172 N. W. 191; *Crane v. Leonard*, *supra*, note 43; *State ex rel. Chambers v. Dist. Ct.*, 139 Minn. 205, 166 N. W. 185; *Grinnell v. Wilkinson*, 39 R. I. 447, 93 Atl. 103.

⁴⁶ *Gooding v. Ott*, *supra*, note 43.

theory has difficulties of its own to meet. If the act is compulsory, not open to rejection by the parties, an essential element of contract, mutual assent, is entirely lacking.⁴⁷ Yet the statute in force at the place of employment has been held to cover injuries sustained elsewhere even in such a case.⁴⁸ If the obligation to pay compensation is contractual its terms will necessarily be governed by requirements in force at the time when the employment began, and the law could not be amended as against existing contracts in a way which would impair the contract within the meaning of the term as used in the Constitution.⁴⁹ The claim for compensation has been held not to be contractual within the statute of limitations.⁵⁰ Once under the act, it is the law and not the contract which governs; the parties may not modify terms.⁵¹ So it may be said that the obligation to pay compensation is neither a substitute for older tort liability nor does it involve contract but is a statutory regulation of the relation of employer and employee based upon the theory that the industry should bear the burden of accidents incident to its operation, and that the fulfillment of this policy requires that the statute should control whether the injury occurs within or without the state where the contract of employment was made. The decided weight of American authority allows recovery of compensation under the statute in force at the place of employment though the injury occurs elsewhere. The theory most frequently advanced is that there is a contract to this effect.⁵² A compulsory statute has been declared inapplicable, however, even though the contract of employment was made

⁴⁷ See discussion, 21 MICH. L. REV. 449.

⁴⁸ *Post v. Burger*, 216 N. Y. 544, 111 N. E. 351. In a later New York case the contract explanation is recognized as not well founded. *Matter of Smith v. Heine, etc., Co.*, 224 N. Y. 9, 119 N. E. 878. The Wisconsin court has held the Wisconsin statute applicable to an accident without the state, though rejecting the contract explanation. *Anderson v. Miller, etc., Co.*, *supra*, note 44.

⁴⁹ See *Anderson v. Miller, etc., Co.*, *supra*, note 44.

⁵⁰ *Davidson v. Payne*, 281 Fed. 544, noted in 21 MICH. L. REV. 449.

⁵¹ *Anderson v. Miller, etc., Co.*, *supra*, note 44.

⁵² See in addition to cases already cited, notes in 3 A. L. R. 1351, 18 A. L. R. 292; also, Angell, "Recovery under Workmen's Compensation Acts for Injury Abroad," 31 HARV. L. REV. 619; and notes in 9 CALIF. L. REV. 234, and 37 HARV. L. REV. 375.

within the state, if the services to be performed were wholly outside the state.⁵³

Could a workman entitled to compensation under the Michigan statute, as in the case supposed above, institute proceedings to collect it in some other state? If the claim is considered an ordinary transitory cause of action, such enforcement should follow as of course. But the majority of compensation acts provide special machinery for handling cases arising under them; hearings before a designated commission, review and control by an industrial board, and so on. If the right to compensation is limited to cases where the claimant makes use of the designated procedure to secure it, there is no claim to be enforced in another state unless the designated procedure has been followed. Recovery for claims arising under the New Jersey act has been refused in New York for this reason.⁵⁴ On the other hand, it has been judicially suggested that matters of venue and compensation may well be distinguished and recovery under a foreign act be permitted.⁵⁵ If they can be separated in a particular case there seems no reason why recovery under a foreign act might not be allowed.⁵⁶

We may put further questions concerning the rights of this workman, employed in Michigan by the Michigan company, who is injured in the course of his employment while working for the employer in Ohio. Could he claim compensation under the Ohio statute? It has been held that where the act in force at the state of employment is not applicable, recovery may be

⁵³ *Matter of Smith v. Heine, etc., Co.*, *supra*, note 48; *Gardner v. Horseheads Constr. Co.*, 171 App. Div. 66, 156 N. Y. Supp. 899; *Perlman v. Lederer*, 189 App. Div. 425, 178 N. Y. Supp. 449. In *Stansberry v. Monitor Stove Co.*, 150 Minn. 1, 183 N. W. 977, the Minnesota act was held applicable to injuries sustained by a salesman whose territory "was for the most part in North Dakota," the place of injury. The business of the employer was said to be "localized" in Minnesota. The New York result finds support in *Altman v. N. D., etc.*, Bureau, 195 N. W. 287 (N. D. 1923); *contra*, under an optional statute, *Hulswit v. Escanaba Mfg. Co.*, 218 Mich. 331, 188 N. W. 411.

⁵⁴ *Lehmann v. Ramo Films*, 92 Misc. 418, 155 N. Y. Supp. 1032; *Verdicchio v. McNab & H. Co.*, 178 App. Div. 48, 164 N. Y. Supp. 290.

⁵⁵ *Douthwright v. Champlin*, 91 Conn. 524, 100 Atl. 97.

⁵⁶ The question was left open in *Anderson v. Miller, etc., Co.*, *supra*, note 44.

had under the act in force at the place of injury.⁵⁷ Regarding the statute as a substitute for older tort liability, the result is clearly sound. So, too, if it is regarded as regulation of the incidents of the relation of employer and employee. Attempted explanations on the contract theory seem somewhat artificial. Other cases have applied the compensation law of the place of injury⁵⁸ even where there was a contract stipulating that some other rule should govern.⁵⁹ Conclusions upon the matter, at the present stage of development, must be very tentative. Application of the legal rules in force at the place of injury seems the more natural rule to apply. But to carry out the purpose of the statutes, the employee may well claim compensation under the law of the place where he was hired, and where the employer's business is carried on, even though he was injured while temporarily engaged in that business outside the state. Presumably he could not claim compensation twice.⁶⁰ Nor can the employee as against the employer, secure a double recovery in compensation under a statute and a judgment for damages in tort. So where he was entitled to compensation under the act at the place of hiring no action based upon alleged negligence

⁵⁷ *Douthwright v. Champlin*, *supra*, note 55, noted in 27 *YALE L. JOUR.* 113 (here the workman's contract of employment was made in Massachusetts, and that court had declared the statute not applicable to injuries outside the state); *Banks v. Howlett Co.*, 92 Conn. 368, 102 Atl. 822; *Smith v. Heine, etc., Co.*, 119 Me. 552, 112 Atl. 516 (hiring in New York, but employment exclusively outside the state and New York statute not applicable). See also *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620; *Bozo v. Central C. & C. Co.*, 54 Utah 289, 180 Pac. 432.

⁵⁸ *Amer. Rad. Co. v. Rogge*, 86 N. J. L. 436, 92 Atl. 85, *affd.* 87 N. J. L. 314, 93 Atl. 1083. There was no compensation law in New York at the time of hiring, but in a case following this decision, *West J. T. Co. v. Phil., etc., R. Co.*, 88 N. J. L. 102, 95 Atl. 753, where the hiring was in Pennsylvania, it does not appear whether there was a compensation act in that state or not. See also *Royal Indem. Co. v. Platt, etc., Co.*, 91 Misc. 631, 163 N. Y. Supp. 107. In *Hopkins v. Matchless, etc., Co.*, 99 Conn. 457, 121 Atl. 828, the court said the local act did not cover an injury which took place in the state, where the contract of hiring was in New Jersey, though no services were to be performed in that state.

⁵⁹ *Carl Hagenbeck, etc., Co. v. Randall*, 75 Ind. App. 417, 126 N. E. 501.

⁶⁰ In *Gilbert v. Des Lauriers Co.*, 180 App. Div. 59, 167 N. Y. Supp. 274, the New York employee, injured in New Jersey, had claimed compensation under the New Jersey statute and afterwards claimed under the New York law. He was allowed to do so, the insurance carrier being credited with the amount paid under the New Jersey award.

can be maintained at the place of injury.⁶¹ *A fortiori*, if the place of hiring and injury are the same, and the compensation act applies, no tort action is maintainable elsewhere.⁶²

DEATH BY WRONGFUL ACT.

At common law no action for damages could be maintained against a defendant for causing the death of a human being. This rule applied not only to a claim for injuries to the victim asserted by his personal representative, but precluded also any action on the part of those dependent upon the deceased who suffered pecuniary loss by reason of his death. Though no satisfactory reason for the rule was ever offered it was firmly established by authority. To relieve its harshness there was passed in England, in 1846, a statute known as Lord Campbell's Act, "for compensating the families of persons killed in accidents." New York enacted legislation for the same purpose in 1847 and such statutes have now been everywhere adopted though they differ greatly in form and detail. From these differences Conflict of Laws questions develop.⁶³

⁶¹ *Barnhart v. Am. Concrete Steel Co.*, 227 N. Y. 531, 125 N. E. 675, *Schweitzer v. Hamburg Amer. Line*, 78 Misc. 448, 138 N. Y. Supp. 944.

⁶² *Albanese v. Stewart*, 78 Misc. 581, 138 N. Y. Supp. 942; *Wasilewski v. Warner Co.*, 87 Misc. 156, 149 N. Y. Supp. 1035; *Bozo v. Central C. & C. Co.*, *supra*, note 57. See also *Johnson v. Nelson*, 128 Minn. 158, 150 N. W. 620. If the injury has been caused by actionable conduct by a third party, most statutes provide that the employer or insurance company, upon payment of compensation, is subrogated to the workmen's claim against the tortfeasor. If not, settlement with such tortfeasor does not preclude a claim for compensation. *Newark Pav. Co. v. Klotz*, 85 N. J. L. 432, 91 Atl. 91; nor does the receipt of compensation preclude a recovery against the wrongdoer. *Biddinger v. Steininger-Taylor Co.*, 25 Oh. Dec. 603. In *Rorvik v. N. P. Lbr. Co.*, 99 Ore. 58, 190 Pac. 331, 105 Pac. 163, suit was allowed in Oregon against the alleged tortfeasor though the claimant had been awarded compensation in California. The statute in the latter state provided for subrogation to the amount of compensation paid. But the award of compensation had not been paid; further, the plaintiff's claim in Oregon was for a greater amount than the compensation award, so the plaintiff was at least part owner of the claim and so entitled to sue. For discussion of the subrogation point, see 21 MICH. L. REV. 489.

⁶³ Authorities upon the common law rule and references to the various statutes may be found in the opening chapters of Tiffany's "Death by Wrongful Act." A note in 64 U. OF PA. L. REV. 626 presents the interesting question of whether recovery by the injured man in his lifetime precludes an action by

No action may be brought in one state for injuries resulting in death which were inflicted in another state unless an action is given by the laws of the state where the injury occurred.⁶⁴ It is not enough that there is such a statute at the forum, allowing recovery for death by wrongful act.⁶⁵ If the effect of the common law rule expressed in the maxim *actio personalis moritur cum persona* was only to preclude recovery for an admitted tort because of the lack of a person to enforce the claim,⁶⁶ a statute of the forum allowing suit in such case by the personal representative of the deceased would supply the defect, and the action could be allowed. But the prevailing view is that the death statutes create a new right,⁶⁷ and this right must be given by the *lex loci delicti*.

PLACE OF BRINGING ACTION.

Since, as has already been said, a claim for personal tort is transitory in its nature, it would naturally follow that the action for death for wrongful act could be brought wherever the defendant could be found. This has not become the accepted doctrine with regard to such statutes without overcoming some difficulties. There are earlier cases which deny the possibility of recovery under a foreign death-by-wrongful-act statute.⁶⁸

relatives after his death. The *lex domicilii* of the tort feisor, and not the *lex loci delicti*, has been held to govern the question whether an action will survive against his estate. *Whitten v. Bennett*, 77 Fed. 271.

⁶⁴ *L. & N. R. Co. v. Williams*, 113 Ala. 402, 21 So. 938; *Davis v. N. Y. & N. E. R. Co.*, 143 Mass. 301, 9 N. E. 815; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Usher v. W. J. R. Co.*, 126 Pa. 206, 17 Atl. 597. A host of authorities to this effect may be found in 56 L. R. A. 194 note. It is the law of the place of injury, not where death occurs, which governs. See *supra*, note 8.

⁶⁵ *Davis v. N. Y. & N. E. R. Co.*, *supra*, note 64.

⁶⁶ As intimated in *Stewart v. B. & O. R. Co.*, 168 U. S. 445, 448, 18 Sup. Ct. 105. It has been held that the right to revive an action for personal injuries, commenced before the death of the person injured, is to be determined by the law of the place where the action is pending and not by the law of the state where the cause of action arose. *Austin's Adm'r v. Pittsburg, etc., Ry. Co.*, 122 Ky. 304, 91 S. W. 742, 5 L. R. A. (N. S.) 756 and note.

⁶⁷ *Ash v. B. & O. R. Co.*, 72 Md. 144, 19 Atl. 643; *Ohnesorge v. Chic. C. Ry. Co.*, 239 Ill. 424, 102 N. E. 819; *Centofanti v. Pa. R. R.*, *supra*, note 8.

⁶⁸ *Richardson v. N. Y. C. R. Co.*, 98 Mass. 85; *Texas & P. R. Co. v. Richards*, 68 Tex. 375, 4 S. W. 627.

There are many statements to be found which condition the recovery upon the presence of a similar statute in the forum.⁶⁹ With the general adoption of such legislation the question becomes whether the domestic statute is so unlike the one under which recovery is claimed that the plaintiff shall be denied recovery.⁷⁰ But under recent decisions this point becomes unimportant. Remarks by Judge Cardozo in an important New York case⁷¹ are apposite in this connection. He says: "For many years the courts have been feeling their way in the enforcement of these statutes. A civil remedy for another's death was something strange and new, and it did not find at once the fitting niche, the proper category, in the legal scheme. We need not be surprised, therefore, if some of the things said . . . must be rejected today. But the truth, of course, is that there is nothing *sui generis* about these death statutes in their relation to the general body of international law. We must apply the same rules that are applicable to other torts; and the tendency of those rules today is toward a larger comity, if we must cling to the traditional term." The modern and the now prevailing view, is to allow the action to be maintained although the injury from which death resulted was inflicted in another jurisdiction.⁷²

WHO BRINGS THE ACTION.

The claim for damages for death by wrongful act is, as has been said, created by the *lex loci delicti*. The common form of statute, following the English precedent in Lord Campbell's Act, allows an action to be prosecuted by the decedent's admin-

⁶⁹ A collection of these may be found in 56 L. R. A. 202, 203, note.

⁷⁰ 56 L. R. A. 204, 205.

⁷¹ *Loucks v. Standard Oil Co.*, *supra*, note 1a, in which the earlier decisions are reviewed and explained and the modern doctrine announced. See also *Lauria v. E. I. duPont de Nemours Co.*, *supra*, note 26a.

⁷² *Dennick v. Cent. R. Co.*, *supra*, note 36; *Lauria v. duPont de Nemours Co.*, *supra*, note 26a; *Weissengoff v. Davis*, 260 Fed. 16; *Rochester v. Wells, etc.*, Express Co., 87 Kan. 164, 123 Pac. 729; *Higgins v. Central, etc.*, R. Co., 155 Mass. 176, 29 N. E. 534; *Hanlon v. Frederick Leyland & Co.*, 223 Mass. 438, 111 N. E. 907; *Powell v. G. N. R. Co.*, *supra*, note 37; *Loucks v. Standard Oil Co.*, *supra*, note 1a; *Whitlow v. Nashville, etc., Ry. Co.*, 114 Tenn. 344, 84 S. W. 618.

istrator for the benefit of designated surviving relatives. Suppose the decedent is killed in Michigan and suit is brought against the defendant, who negligently caused the death, in Ohio. Is the Michigan or the Ohio administrator the proper plaintiff? It is a well settled general rule that an administrator appointed in one state has no standing in his representative capacity in the courts of another.⁷³ But the death statute, while it names the administrator as the party in whose name the action is to be brought, generally provides that the money recovered does not go into the general estate of the ^{decedent} defendant but is a special fund for the named beneficiaries. The administrator from the place of injury, where he sues elsewhere, does not appear on behalf of the estate of the deceased, but as a trustee of those who are to get the money recovered.⁷⁴ There is ample authority which allows the foreign administrator appointed in the state where the deceased was injured thus to sue in a state where he has not qualified, and upon the theory mentioned.⁷⁵ Letters of administration may be granted in the state where the cause of action arose even though the deceased left no other property

⁷³ Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525.

⁷⁴ If recovery is sought under a statute of the *lex loci delicti* which provides for survival of actions for injuries despite the resulting death therefrom, so that the administrator sues as personal representative of the deceased, the damages becoming part of the estate, it seems that such a suit is one brought by the administrator in his representative capacity and could only be maintained by one who had qualified as administrator at the forum, as was done in Higgins v. Central, etc., R. Co., *supra*, note 72. In Brown v. C. & N. W. Ry. Co., 129 Minn. 347, 152 N. W. 729, an Iowa representative was allowed to recover in Minnesota, the accident having taken place in Iowa. The Iowa statute is in terms a survival act but provides that certain persons shall receive the amount recovered and has been treated in many ways like the ordinary death by wrongful act statute. See 2 IOWA L. BULLETIN 196. See also Hoes v. N. Y., N. H. & H. R. Co., 73 App. Div. 363, 77 N. Y. Supp. 117; Sanbo v. U. P. Coal Co., 130 Fed. 52.

⁷⁵ Knight v. Moline, etc., Ry. Co., 160 Iowa 160, 140 N. W. 839; Brown v. C. & N. W. Ry. Co., 129 Minn. 347, 152 N. W. 729; Voris v. C. M. & St. P. Ry. Co., 172 Mo. App. 125, 157 S. W. 835; Boulden v. Pa. R. Co., 205 Pa. 264, 34 Atl. 906; Connor v. N. Y., N. H. & H. R. Co., 28 R. I. 560, 68 Atl. 481, 18 L. R. A. (N. S.) 1252 and note. Contra, S. W. R. Co. v. Paulk, 24 Ga. 356. In re Lowham, 30 Utah 436, 85 Pac. 445, the administrator had qualified at the forum.

there.⁷⁶ If the statute vests the action in the widow or other designated relative, such person may sue in another state.⁷⁷

Suppose the statute provides that the action is to be brought by the "personal representative." Does that limit the power to bring the action to an administrator or executor appointed in the state where the cause of action arose? It does not settle this question to say that the proper party plaintiff in an action under the foreign statute is the person thereby authorized to sue.⁷⁸ What must be determined is, who is the person so authorized? If the statute under which the suit is brought vests the action in beneficiaries in their own right (as widow or parents), such named beneficiary, and only that person, may maintain the action in another state; even though by the law of the forum such an action is given to the personal representative of the decedent.⁷⁹ But where the statute of the place of injury provides for suit by the "personal representative" a more liberal rule has been observed. A personal representative appointed in the state in which the deceased had his domicile has been allowed to sue in the jurisdiction where he was appointed,⁸⁰ though

⁷⁶ *In re Mayo*, 60 S. C. 401, 38 S. E. 634; *Sharp v. Cincinnati, etc., Ry. Co.*, 133 Tenn. 1, 179 S. W. 375; *Jordan v. C. & N. W. R. Co.*, 125 Wis. 581, 104 N. W. 803, 1 L. R. A. (N. S.) 885 and note collecting authorities. See also *Cooker v. Gulf, etc., R. Co.*, 41 Tex. Civ. App. 596, 93 S. W. 201. This rule arises from necessity rather than logic. If the claim is not part of the estate of the decedent, how can an administrator of the decedent be appointed if there is no estate to administer? But if the deceased left no belongings, should that fact defeat the enforcement of the claim for his death because there is no place where an administrator can be appointed? Such a rule would preclude the bringing of the action in cases where the beneficiaries most need it.

⁷⁷ *Strait v. Yazoo & M. R. Co.*, 209 Fed. 157; *Wooden v. Western, etc., R. Co.*, 126 N. Y. 10, 26 N. E. 1050. See also note 79.

⁷⁸ As is said in *Tiffany on Death by Wrongful Act*, Sec. 201. Fuller discussion may be found, however, in Sec. 110.

⁷⁹ *Teti v. Consolidated Coal Co.*, 217 Fed. 443; *Rankin v. Cent. R. Co.*, 77 N. J. L. 175, 71 Atl. 55; *Johnson v. Phoenix Bridge Co.*, 197 N. Y. 316, 90 N. E. 953. But in *Bussey v. C. & W. C. R. Co.*, 73 S. C. 215, 53 S. E. 165, the court said the widow should sue as administratrix as provided under the local statute. Where the *lex loci delicti* gives the recovery to the personal representative, the widow cannot sue in her own right in another state. *Usher v. W. J. R. Co.*, *supra*, note 64.

⁸⁰ *Williams v. Camden I. R. Co.*, 138 Fed. 571; *Denver & R. G. R. Co. v. Warring*, 37 Colo. 122, 86 Pac. 305; *Hanlon v. Frederick Leyland & Co.*, 223 Mass. 438, 111 N. E. 907, L. R. A. 1917A 34 and note; *Leonard v. Col. etc., Co.*, 84 N. Y. 48; *Nelson v. C. & O. R. Co.*, 88 Va. 971, 14 S. E. 838. *Contra, Battese v. U. P. Ry. Co.*, 102 Kan. 468, 170 Pac. 811; *Woodward v. Mich., etc., R. Co.*, 10 Oh. St. 121.

the place of injury was elsewhere. The same rule has been applied to a local administrator without regard to the decedent's domicile where the injury was sustained in another state,⁸¹ but denied to the domiciliary administrator suing at the *locus delicti*.⁸² The cases cannot all be reconciled.⁸³

Perhaps some assistance may be had in the following analysis of the subject, which is believed to be consistent with most of the decisions. The existence of any claim to be enforced depends upon the *lex loci delicti*. A statute of that state must provide for recovery if recovery is to be had. Next there is the question of whether the claim may be sued upon outside the state of its creation. This question is now pretty well settled in the affirmative. Then there is the third question, which is often confused with the second, who is the proper person to enforce the claim. If it is vested by the statute creating it in some one person for his own use and benefit, such person becomes the owner and is the proper and only proper party to enforce the claim at the *locus delicti* or elsewhere. But if the statute provides that the action is to be brought by the administrator or some other representative on behalf of designated beneficiaries, there seems no reason for an inflexible rule. The defendant, if he once pays to an authorized plaintiff, is discharged from further liability.⁸⁴ It should be immaterial to him by whom

⁸¹ *Dennick v. Cent. R. Co.*, *supra*, note 36; *Teti v. Consol. Coal Co.*, *supra*, note 79. In *Stewart v. B. & O. Ry. Co.*, *supra*, note 66, the personal representative was allowed to recover in the District of Columbia, the accident took place in Maryland. By the Maryland statute, the claim was to be sued upon in the name of the state for the benefit of the parties named. The case contains some inaccurate dicta and has been much commented upon. See *Williams v. Camden I. R. Co.*, *supra*, note 80; *Teti v. Consol. Coal Co.*, *supra*, note 79.

⁸² *Hall v. So. Ry. Co.*, 146 N. C. 345, 59 S. E. 879. But in *K. P. Ry. Co. v. Cutter*, 16 Kan. 568, the representative appointed in Colorado was allowed to sue in Kansas where the injury occurred. Where the decedent was domiciled in Kansas, however, the Nebraska appointed representative was not allowed to sue in Kansas. *Metrakos v. K. C., etc., Ry. Co.*, 91 Kan. 342, 137 Pac. 953.

⁸³ The citations in the foregoing notes are not exhaustive though they represent the way in which most of the problems have been treated. For further authorities see 56 L. R. A. beginning on 197; 18 L. R. A. (N. S.) 1252; L. R. A. 1917A 34. As to whether a non-resident alien may sue, see 57 U. OF PA. L. REV. 171.

⁸⁴ *Nelson v. C. & O. R. Co.*, *supra*, note 8a.

the suit is brought. No one is injured by allowing an action to be brought wherever the defendant may be legally served, either by the personal representative appointed at the *locus delicti*, or where the deceased was domiciled or at the place where suit is brought. It could be said that the question of the persons in whose name the suit is to be brought is a remedial matter and that the *lex fori* must be complied with.⁸⁵ But the decisions already discussed establish that the plaintiff need not have qualified as administrator at the forum. Strict adherence to technical rules regarding the proper party plaintiff will be productive of much hardship unless the rules are well defined and generally agreed upon. The period in which action must be started under these statutes is generally short. By the time an appellate court has ruled that the suit was initiated by the wrong plaintiff it will be too late to begin another action.

AMOUNT AND DISTRIBUTION OF DAMAGES.

A statute which creates a cause of action for death by wrongful act may set a limit to the amount which may be recovered, or otherwise regulate the assessment of damages. This is part of the right, and is governed by the *lex loci delicti*.⁸⁶ The same is generally true of the time in which the action must be commenced.⁸⁷ It follows logically that the *lex loci delicti*

⁸⁵ *Bussey v. C. & W. C. R. Co.*, *supra*, note 79. Cf. *Teti v. Consolidated Coal Co.*, 217 Fed. 443, 453, where the court says: "... the better and more sensible doctrine . . . [is] . . . that when under . . . the statute of another state giving or preserving a right of action to the widow or children, or parents, or other next of kin, in case of death by wrongful act, such statute provides that suit shall be . . . prosecuted by one of the number, or by administrators, for the benefit of all, that in New York its statutory form of representation shall, or at least, may be followed when the action to enforce the statute is brought in this state."

⁸⁶ *N. P. R. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978; *Lauria v. duPont de Nemours Co.*, *supra*, note 26a, commenting upon a *dictum* contra in *Wooden v. Western, etc., R. Co.*, *supra*, note 77; *Powell v. G. N. R. Co.*, *supra*, note 37. Mr. Justice Holmes states the theory in *W. U. Tel. Co. v. Brown*, 234 U. S. 542, 547, 34 Sup. Ct. 955: "When a person recovers in one jurisdiction for a tort committed in another he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground but the measure of the maximum recovery."

⁸⁷ See 48 L. R. A. 639 note.

which gives the right also determines to whom the damages recovered shall be distributed, and such is the rule.⁸⁸ An ambiguity in construction is presented, however, when the statute provides that the damages shall be distributed to the beneficiaries in the proportion in which they would share in the decedent's estate in case of intestacy, or similar clause. Does this refer to the statute of distributions of the place of injury or of the decedent's domicile? The prevailing view adopts the first construction.⁸⁹ The situation under a survival statute where it is provided that the damages recovered become part of the personal estate of the decedent seems clearly distinguishable. In such a case it has been held that the usual rule for devolution of personal property, *i. e.*, that the law of the domicile furnishes the rule for distribution, should control.⁹⁰

HERBERT F. GOODRICH.

University of Michigan Law School.

⁸⁸ Pa. R. Co. v. Levine, 263 Fed. 557; Denver & R. G. R. Co. v. Warring, *supra*, note 80; *In re* Coe's Estate, 130 Iowa 307, 106 N. W. 743, 4 L. R. A. (N. S.) 814 and note; Charlton v. St. L. & S. F. R. Co., 200 Mo. 413, 98 S. W. 529.

⁸⁹ Pa. R. Co. v. Levine, *supra*, note 88; McDonald v. McDonald, 96 Ky. 209, 28 S. W. 482. In the Levine case it was thought that the local statute of distributions excluded the particular decedent's estate from its operation. See comment, 29 YALE L. JOUR. 798.

⁹⁰ Hartley v. Hartley, 71 Kan. 691, 81 Pac. 505.